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No. —329

In the Supreme Court of the United States

OCTOBER TERM, 1957

THE UNITED STATES, PETITIONER

v.

WILLIAM ODY WASHINGTON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review judgment of the United States Court of Claims entered in the above case on April 3, 1957.

OPINION BELOW

The opinion of the Court of Claims (App., *infra*, pp. 12-19) is not reported.

JURISDICTION

The Court of Claims granted summary judgment for the respondent on January 16, 1957 (App., *infra*, p. 19), and a timely petition for reconsideration was denied on April 3, 1957 (R. 134). By order of Mr. Justice Black, dated June 27, 1957, the time for filing a petition for a writ of certiorari was extended to and

including August 1, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether, under Section 14 of the Veterans' Preference Act, a veterans' preference eligible, if he so requests, must be given a personal hearing by his employing agency on written charges presented against him in a discharge proceeding conducted pursuant to Section 14.

STATUTE INVOLVED

Section 14 of the Veterans' Preference Act of 1944 (58 Stat. 390, 61 Stat. 723, 5 U.S.C. 863) provides as follows:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligi-

ble shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided*, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: *Provided further*, That the Civil Service Commisssion may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 15 hereof.

STATEMENT

This is an action in the Court of Claims by a veterans' preference eligible to recover salary claimed as a result of his allegedly unlawful discharge from a position as clerk in the District of Columbia Post Office.

The underlying facts are simple and undisputed:

On July 7, 1952, the Postmaster in charge of the District of Columbia Post Office notified the respondent by letter that his "scheme examination record" had been unsatisfactory,[1] and that disciplinary action would be taken unless she showed immediate improvement in this regard (App., *infra*, p. 12). Washington received an unsatisfactory efficiency rating effective September 15, 1952, on the ground that his "scheme examination record" had continued to be unsatisfactory, that he had been absent from duty without authorization, and that he had failed to comply with instructions (App., *infra*, pp. 12-13).

In a letter dated October 16, 1952, the District of Columbia Postmaster formally charged Washington with "unsatisfactory scheme examinations" and "unsatisfactory attendance." (App., *infra*, p. 13). Detailed specifications were supplied with each charge, and Washington was informed of his rights to answer the charges "personally and in writing" (App., *infra*, p. 13). Washington replied to the letter of charges on October 21, 1952, in effect admitting the charges against him and setting forth certain extenuating circumstances (App., *infra*, p. 13). He requested in this letter a personal interview with the District of Columbia Postmaster (App., *infra*, p. 13). On October 29, 1952, the Postmaster forwarded a copy of the letter of charges to the Assistant Postmaster General, requesting authority to remove Washington from his position (App., *infra*, p. 13). The Postmaster's letter set forth certain additional irregularities in Washington's performance, which had not

[1] Such examinations pertain to schemes for the sorting and distribution of mail followed in the Washington Post Office (R. 53).

been mentioned in the letter of charges (App., *infra*, p. 13). On November 6, 1952, the Assistant Postmaster General notified Washington that his discharge from his clerk's position had been authorized, effective November 22, 1952; the letter referring specifically to the formal charges against Washington of unsatisfactory scheme examinations and unsatisfactory attendance (App., *infra*, p. 13). The Postmaster, in a formal notice directing Washington's removal dated November 7, 1952, referred to the charges against Washington of unsatisfactory scheme examinations and unsatisfactory attendance but not to any other charges (App., *infra*, pp. 13-14).

Washington appealed his removal to the Fourth Civil Service Region of the United States Civil Service Commission (App., *infra*, p. 14). A *de novo* hearing was held by the Fourth Region in which Washington appeared, represented by counsel, but did not testify (App., *infra*, p. 14). On February 19, 1953, the Fourth Civil Service Region sustained the validity of the discharge on the grounds specified in the formal charges. Respondent then appealed to the Board of Appeals and Review of the Civil Service Commission, and thereafter to the Commissioners of the Civil Service Commission which on May 25, 1954, sustained his dismissal affirming the decisions of the Fourth Region and the Board of Appeals and Review (App., *infra*, p. 14).

On August 6, 1954, respondent filed a complaint in the United States District Court for the District of Columbia, seeking a declaratory judgment that his removal was procedurally invalid, and praying for reinstatement on the grounds (1) he had been denied

a personal hearing before the Postmaster and (2) his discharge had been based on additional allegations of irregularities in his job performance which had not been included in the original formal letter of charges (App., *infra*, p. 14). Summary judgment was entered on behalf of the Postmaster General, and Washington appealed to the United States Court of Appeals for the District of Columbia Circuit contending that his discharge was procedurally defective on the same grounds relied upon in the District Court (App., *infra*, p. 14). The Court of Appeals affirmed the judgment of the District Court on November 23, 1955, holding that Washington's discharge had been based exclusively on the formal charges presented to him in the letter dated October 16, 1952, and that the Veterans' Preference Act gave Washington no right to a personal interview or hearing before the Postmaster (R. 52-55). *Washington* v. *Summerfield*, 228 F. 2d 452. In reaching this result, the Court of Appeals held that Section 14 of the Act (*supra*, pp. 2-3), which provides that a veteran "shall be allowed a reasonable time for answering [charges preferred against him] personally and in writing," means that a veteran shall be given a full opportunity to answer charges against him in writing, but does not provide a right to a hearing before the department or agency concerned (R. 55, 228 F. 2d at 454-455).

On January 31, 1956, Washington brought this action in the Court of Claims seeking a declaration as to the validity of his discharge and unpaid salary (R. 1-3). In his petition and argument, Washington relied on the same allegations of procedural defects rejected by the District Court and the Court of

Appeals:—namely, that (1) he had been denied a "personal hearing or interview with the Postmaster and (2) he had been dismissed on charges not included in the formal statement of charges presented to him (R. 33). Both parties moved for summary judgment (R. 7, 57). In an opinion issued January 16, 1957, the Court of Claims, after noting that there were no allegations of arbitrary or capricious action on the part of the Post Office Department or its officers (App., *infra*, p. 14), held that Washington had been removed solely on the basis of the formal charges included in the October 16, 1952 letter—thereby rejecting, as had the District Court and the Court of Appeals, this asserted procedural defect. The Court of Claims went on, however, to hold that Section 14 of the Veterans' Preference Act entitles a veterans' preference eligible to a "personal hearing at the agency level," and that Washington had requested and been denied such a hearing. It concluded that there had been a violation of Washington's procedural rights accorded to him by the Veterans' Preference Act, and accordingly granted his motion for summary judgment (App., *infra*, pp. 16-19).

REASONS FOR GRANTING THE WRIT

1. The Court of Claims has rendered a decision in square conflict with the Court of Appeals for the District of Columbia Circuit in a case involving the same plaintiff, identical facts, and identical legal issues, and on a question of continuing importance, *i.e.*, whether Section 14 of the Veterans' Preference Act, in addition to the many other procedural safeguards which it confers upon a veterans' preference eligible against whom charges have been made, also confers

upon him the unqualified right to be heard personally at the agency level. The ruling below thus presents the anomaly of fundamental disagreement in the interpretation of the Veterans' Preference Act between the two courts which are primarily responsible for reviewing federal employee discharges. The Court of Appeals has held that Washington was validly discharged because he was not entitled to a personal interview or hearing before the Postmaster; the Court of Claims has held that Washington's discharge was invalid because Section 14 entitles a preference eligible to a "personal hearing at the agency level," and Washington requested and was denied such a hearing.

Certiorari is plainly warranted to resolve this conflict. For, while the correct determination of the question is obviously of significance to the administration of the veterans' preference law, resolution of the fundamental disagreement on the interpretation of Section 14 by the two courts most concerned with its application is of even greater importance both to veterans and the Government. If the conflict is not settled authoritatively, any discharged veteran who has not received a personal hearing from his agency will be able to recover past salary or wages in the Court of Claims despite the fact that his discharge has been declared procedurally valid by the District Court or the Court of Appeals for the District of Columbia Circuit. An unlawfully discharged veteran is ordinarily entitled to reinstatement, as well as back pay. But where the District Court or the Court of Appeals have held a dismissal valid, and the Court of Claims reaches an inconsistent conclusion, the status of the employee, including his right to reinstatement and to subsequent

compensation, is left completely in doubt since the Court of Claims has no power to order reinstatement of a discharged employee (see 5 U.S.C. 652).[2] Regardless of what interpretation is placed upon Section 14, therefore, the present conflict between the Court of Appeals and the court below should not be left unresolved.[3]

2. The Court of Appeals, we submit, was correct in concluding (228 F. 2d at 454-455) that Section 14 in terms

> provides that a veterans preference eligible "shall be allowed a reasonable time for answering the same [the charges] personally and in writing." It does not provide for a conference or "minimal hearing," as appellant would urge. We conclude that this means that he shall personally answer the charges in writing. Such has been the administrative practice, with which, in the absence of a misconstruction of the governing statute, we should not interfere. Our view is buttressed by the fact that, on appeal to the Civil Service Commission from an adverse decision, it is provided that such preference eligible "shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may

[2] Under 5 U.S.C. 652(b)(2), a discharged veteran is entitled to back pay only on reinstatement by his agency.

[3] The importance of this question is indicated by the fact that, as we are informed, during the fiscal year ending June 30, 1956, there were approximately 13,500 separations of Government civilian employees for cause, of which approximately half were subject to Section 14 of the Veterans' Preference Act. The figures for prior years are reported to be of comparable magnitude.

> be issued by the Civil Service Commission: * * *. It would seem clear that the difference in language, all appearing in Section 14, indicates that there is a difference between answering the charges "personally and in writing" and the right to "make a personal appearance."

The uniform interpretation given Section 14 and its predecessor statutes by the Civil Service Commission, as well as the language of Section 14 read as a whole, provide support for the view that Congress did not intend to grant every discharged veteran both a full-fledged hearing before his employing agency and a second completely *de novo* hearing and review by the Civil Service Commission.

The language, "answering personally and in writing", in Section 14, appears to be an adaptation of language employed in Section 6 of the Lloyd-LaFollette Act of 1912 (37 Stat. 555) which, prior to amendment in 1948 (62 Stat. 354), provided that a civil service employee was entitled to "be allowed a reasonable time for personally answering [charges against him] in writing" (5 U.S.C., 1946 Ed., 652). Since there has never been any doubt that the Lloyd-LaFollette Act does not provide a hearing at the agency level, it appears unlikely that Congress intended to specify or require such a hearing in Section 14 by the slight shift in wording which occurs between the "personally answering in writing" of the Lloyd-LaFollette Act and the "answering personally and in writing" of Section 14. This conclusion is strengthened by subsequent provision in Section 14 (*supra*, p. 3) of "the right to make a personal appearance" before the Civil Servie Commission on

appeal to the Commission, and that the hearing is to be conducted "in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission".

As the Court of Appeals recognized in rejecting respondent's claim, it seems improbable that Congress would have provided in plain and detailed language for a hearing before the Civil Service Commission, while at the same time adopting substantially the language of the Lloyd-LaFollette Act (which has never required a hearing) to express an intention that the veteran be given an additional hearing at the agency level. The more correct conclusion appears to be that the language "personally and in writing" was designed merely to make it clear that the veteran has a right to make a personal response in writing to the charges against him.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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Solicitor General.
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Attorneys.

JULY 1957.

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 44-56

(Decided January 16, 1957)

WILLIAM ODY WASHINGTON

v.

THE UNITED STATES

ON DEFENDANT'S AND PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

JONES, *Chief Judge*, delivered the opinion of the court:

Plaintiff, a preference eligible within the meaning of the Veterans' Preference Act of 1944, as amended, 5 U.S.C. § 851, *et seq.*, sues to recover wages which he alleges are due him as a result of his unlawful removal from his position as a clerk in the City Post Office of the District of Columbia. Both parties move for summary judgment.

There is no dispute as to the facts involved in this case. Prior to November 22, 1952, plaintiff was employed as a clerk in the Post Office Department, Bureau of Post Office Operations, Washington, D. C. On July 7, 1952, the Postmaster for the District of Columbia notified plaintiff by letter that in view of his unsatisfactory scheme examination record, disciplinary action would be necessary unless immediate improvement was shown. On September 18, 1952, plaintiff was given an unsatisfactory efficiency rating effective September 15, 1952. The reasons given for this action were plaintiff's unsatisfactory scheme ex-

amination record, his absences from duty without permission, and his failure to comply with instructions.

By letter dated October 16, 1952, the Postmaster charged the plaintiff with "unsatisfactory scheme examinations" and "unsatisfactory attendance." Details of each charge were set forth and plaintiff was informed of his right to answer the charges "personally and in writing." In a letter to the Postmaster dated October 24, 1952, plaintiff, in effect, admitted the charges against him and set forth certain extenuating circumstances stemming from financial and marital difficulties. He concluded his letter with a request to see the Postmaster personally so that he could explain his case more fully. Subsequently, in a letter to the Postmaster dated November 20, 1952, plaintiff stated that he had attempted to see the Postmaster personally but had "been blocked at every attempt." This letter set out in detail the marital and financial difficulties of the plaintiff and requested that he be given "another chance."

On October 29, 1952, the Postmaster forwarded a copy of the letter of charges, dated October 21, 1952, to the Assistant Postmaster General with a request that authority be issued for plaintiff's removal. The Postmaster's accompanying letter set forth additional irregularities in plaintiff's performance which did not appear in the letter of charges served on plaintiff.

On November 6, 1952, the Assistant Postmaster General notified the plaintiff that his removal from the position of Clerk had been authorized effective November 22, 1952. This letter made reference to the charges preferred against plaintiff for unsatisfactory scheme examination and unsatisfactory attendance. On November 7, 1952, the Postmaster notified plaintiff of his removal which was to become effective at the

close of business on November 22, 1952. The Postmaster's letter stated that this action was being taken after the Post Office Department had given careful consideration to the charges preferred against the plaintiff for unsatisfactory scheme examination, and unsatisfactory attendance.

Thereafter, plaintiff appealed his removal to the Fourth United States Civil Service Region of the United States Civil Service Commission. He submitted an affidavit and on January 26, 1953, a *de novo* hearing was held. Plaintiff was represented by counsel and did not testify in his own behalf. On February 19, 1953, the Fourth Region rendered an opinion upholding plaintiff's removal.

Plaintiff then appealed to the Board of Appeals and Review of the Civil Service Commission, and on October 30, 1953, that Board sustained the decision of the Fourth Region. Plaintiff next appealed to the Commissioners of the Civil Service Commission and by letter dated May 25, 1954, the Commissioners upheld plaintiff's dismissal by the Post Office Department.

On August 6, 1954, plaintiff filed a complaint in the District Court for the District of Columbia (Civil No. 3360-54) seeking a declaratory judgment that his removal was not in accordance with law, and praying for reinstatement. On cross-motions for summary judgment, the District Court held that plaintiff was not entitled to reinstatement, and on November 23, 1955, the Court of Appeals for the District of Columbia affirmed the action of the district court in *Washington v. Summerfield* (No. 12,544, decided November 23, 1955).

Plaintiff does not allege that the administrative action taken in the present case was arbitrary or capricious or so clearly erroneous as to impute bad faith.

He contends merely that certain procedural rights given him by the Veterans' Preference Act were denied him by the Post Office Department. In this situation we are not authorized to consider the merits of plaintiff's case but merely whether or not his procedural rights have been violated. *Eberlein* v. *United States*, 257 U. S. 82; *Engelhardt* v. *United States*, 125 C. Cls. 603; *O'Brien* v. *United States*, 124 C. Cls. 655.

Plaintiff takes the position that the Post Office Department, in removing him from his position as clerk, denied him two of his procedural rights under section 14 of the Veterans' Preference Act. First, he alleges that he was denied his right to be heard in person by the Postmaster, and, second, he alleges that his removal was based upon charges other than those communicated to him in the letter of charges dated October 16, 1952.

The defendant denies that plaintiff's rights were violated in any way.

Section 14 of the Veterans' Preference Act of 1944, 5 U.S.C. § 863, provides as follows:

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person * * * shall have at least thirty days' advance written notice * * * stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for fur-

nishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided*, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative. * * *."

We shall first consider plaintiff's allegation that his removal was based upon charges other than those communicated to him in the letter of charges, dated October 16, 1952. The basis for this allegation is the fact that on October 29, 1952, when the Postmaster forwarded a copy of the letter of charges to the Assistant Postmaster General, the accompanying letter set forth additional irregularities in plaintiff's conduct which were not contained in the letter of charges.

A careful examination of the record has failed to reveal that plaintiff's removal was based upon any charges other than the two specific ones set out in detail in the Postmaster's letter of charges to plaintiff. When the Assistant Postmaster General notified plaintiff that his removal had been authorized, the letter of notification referred only to these two specific charges. This was also true of the Postmaster's letter notifying plaintiff of the effective date of his removal. The case was subsequently heard *de novo* by the Fourth Region of the

Civil Service Commission and in its opinion the Fourth Region made it absolutely clear that it was concerned only with the two specific charges preferred against the plaintiff in the letter of charges.

There is nothing in the record to indicate that the additional irregularities referred to by the Postmaster in his letter of October 29, 1952, were ever considered by anyone in connection with plaintiff's removal. The mere fact that these additional irregularities were mentioned in the letter is insufficient to support the conclusion that plaintiff's removal was based in part upon such irregularities. In the light of the record we must conclude that there is no merit in plaintiff's contention that his removal was based in part upon charges not communicated to him.

Plaintiff's other contention, i. e., that he was denied his procedural right under the Veterans' Preference Act to be heard in person in the agency of his employment, presents a more difficult problem. Plaintiff bases this contention upon that portion of section 14 of the act which provides as follows:

> * * * such preference eligible shall be allowed a reasonable time for answering the same [the charges preferred against him] *personally and in writing.* (Emphasis added.)

The defendant takes the position that the section does not give plaintiff the right to appear personally at the agency level to answer the charges but merely gives him the right to answer the charges in writing. We can not accept this interpretation.

The phrase "personally and in writing" is clear and unambiguous. It means exactly what it says. A veteran who has been charged with certain offenses and given notice that he is to be discharged from his position is given a reasonable time within which to answer

the charges personally if he so chooses, or in writing, or both. We can find nothing in the Veterans' Preference Act or in the legislative history of that act which causes us to believe that Congress intended anything other than what it plainly said, and this court has previously indicated that a veteran is given the right to answer the charges against him in person at the agency level. *Wittner* v. *United States*, 110 C. Cls. 231.

Defendant further contends that even if the plaintiff was entitled to a personal hearing at the agency level, this right was waived since he, in effect, admitted the charges against him. While it is true that the plaintiff did not deny his guilt in his letter to the Postmaster dated October 21, 1952, he ended the letter with the following statement:

> If you will give me an opportunity to come in to see you personally, I am certain that I can explain my case more fully.

We believe that this language constituted a definite request by plaintiff for a personal hearing.

To "answer" to charges, or claims, one need not necessarily plead the general issue, denying that he did the things which he is alleged to have done. He may plead in confession and avoidance, and that is an answer, in law, and in life. In employment relations particularly, mitigating circumstances, often of a highly personal nature, may save a job for a person who, but for these circumstances, would and should be discharged. Whether, if the plaintiff had been permitted to make this kind of a personal appeal to his superior, it would have saved his job, we do not know. But when Congress gave to the veteran the right to appear personally, it must have intended to give him the chance of succeeding in such an appeal. The naked facts, without the personal appeal, could be just as well stated in

writing. And Congress knew, as we all know, that bureaucratic superiors, like other human beings, are susceptible to the effects of personal appeals.

The procedural rights of a veteran under section 14 are clear and simple. In the present case one of those rights was denied. The plaintiff was denied his right to answer the charges against him in person at the agency level. The fact that he was subsequently given a *de novo* hearing at a higher level does not cure this procedural defect. Since the agency did not follow the procedure laid down by Congress plaintiff's discharge was unlawful.

Defendant's motion for summary judgment is denied and plaintiff's motion for summary judgment is granted. Plaintiff is entitled to recover and judgment will be entered to that effect. The amount of recovery will be determined pursuant to Rule 38(*c*).

It is so ordered.

LARAMORE, *Judge*; MADDEN, *Judge*; WHITAKER, *Judge*; and LITTLETON, *Judge*, concur.

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